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No. 04-39

In the Supreme Court of the United States

MILDRED GOLLIE, PETITIONER

v.

ELKAY MINING CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 411(c)(3) of the Black Lung Benefits Act, 30 U.S.C. 921(c)(3), creates an irrebuttable presumption that a miner is totally disabled by pneumoconiosis or died from the disease where the miner

> is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

The question presented is whether "massive lesions in the lung" as used in Section 411(c)(3)(B) includes only those lesions which, if diagnosed by x-ray, would measure greater than one centimeter in diameter.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter*, but is *reprinted in* 92 Fed. Appx. 52. The July 31, 2003, decision of the Benefits Review Board (Pet. App. 4-15) is reported at 22 Black Lung Rep. 1-307. Earlier decisions of the Board (Pet. App. 21-31, 40-53) and the administrative law judge (ALJ) (Pet. App. 16-20, 32-39, 54-67) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3) was entered on April 8, 2004. The petition for a writ of certiorari was filed on July 6, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (BLBA or Act) provides benefits "to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. 901(a). Disputed claims for benefits are adjudicated in the first instance by administrative law judges, 20 C.F.R. 725.452(a), whose decisions are subject to review by the Department of Labor's Benefits Review Board (BRB), 20 C.F.R. 725.481. Persons aggrieved by BRB decisions may seek judicial review in the courts of appeals. 30 U.S.C. 932(a) (incorporating judicial review provisions contained in Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c)); 20 C.F.R. 725.482(a).

"Coal workers' pneumoconiosis—black lung disease—affects a high percentage of American coal miners with severe, and frequently crippling chronic respiratory impairment." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976). Pneumoconiosis is generally classified as either "complicated" or "simple." Complicated pneumoconiosis "involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually produces significant pulmonary impairment and marked respiratory disability." *Id.* at 7. It is distinguished from "simple" pneumoconiosis, which is "generally regarded by physicians as seldom productive of significant respiratory impairment." *Ibid.*

Section 411(c)(3) of the BLBA creates an irrebuttable presumption that "complicated" pneumoconiosis caused a miner's death or total disability if certain criteria are met. That provision states in relevant part:

> If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis * * * as the case may be.

30 U.S.C. 921(c)(3). Section 411(c)(3)'s presumption "operates conclusively to establish entitlement to benefits" under the BLBA, provided that the pneumoconiosis arose out of employment in a coal mine. *Usery*, 428 U.S. at 11, 22 n.21.

Neither the Act nor the Secretary's regulations specify what constitutes a "massive" lesion in the lung that would establish pneumoconiosis through a biopsy or autopsy diagnosis under clause (B) of Section 411(c)(3). In *Double B Mining, Inc.* v. *Blankenship*, 177 F.3d 240, 243 (1999), the Fourth Circuit held that in order to show that lung lesions are "massive," a claimant must introduce evidence to show that the lesions would "show as opacities greater than one centimeter in diameter" if x-rayed. The Fourth Circuit has justified such an "equivalency" determination under the theory that all three clauses are "intended to

describe a single, objective condition," and that clause (A) sets forth the only objective standard (i.e., an opacity of greater than one centimeter when diagnosed by x-ray). *Eastern Associated Coal Corp.* v. *Director, OWCP (Scarbro)*, 220 F.3d 250, 255 (4th Cir. 2000). The court has further explained that "[l]ogic commands that prongs (A) and (B) be similarly equivalents. Any other rule would lead to the irrational result that the determination of whether a miner has totally disabling pneumoconiosis could turn on the method of diagnosis rather than on the severity of his disease." *Blankenship*, 177 F.3d at 243.

2. Petitioner is the widow of Joe Gollie, who before his death in 1996 worked as a coal miner for 34 years. Pet. App. 56. Petitioner filed a claim for survivor's benefits under the BLBA. Because the claim was contested by respondent Elkay Mining Company, the matter proceeded to a hearing before an ALJ. *Id.* at 56-57.

a. After receiving conflicting medical evidence from the parties, including the opinions of several medical doctors, the ALJ determined that petitioner had successfully invoked Section 411(c)(3)'s irrebuttable presumption. Pet. App. 65. The ALJ relied primarily on the opinion of the pathologist who performed the autopsy of the decedent. *Ibid.* That pathologist "diagnosed progressive massive fibrosis based on his observation of a 5.5 x 5.0 x 3.0 cm. anthracotic lesion," *id.* at 64, and opined that the decedent suffered from complicated pneumoconiosis. *Id.* at 57.

Elkay Mining appealed to the BRB, which vacated the ALJ's decision. Pet. App. 40-53. The BRB noted that none of the doctors specifically opined on whether the lesions observed through autopsy evidence would appear in an x-ray as an opacity of greater than one

centimeter in diameter. *Id.* at 50. Because governing Fourth Circuit precedent required that equivalency determination, the BRB remanded to permit the ALJ to reconsider the evidence. *Id.* at 51.

b. On remand, the ALJ again ruled in petitioner's favor. Pet. App. 32-39. The ALJ relied upon the reports of two pathologists, Drs. Naeye and Kleinerman, both of whom reviewed autopsy slides to determine the cause of death. *Id.* at 37-38. Dr. Naeye had testified that one of the nodules that he viewed on the slides "would look like complicated pneumoconiosis on x-ray," and Dr. Kleinerman had testified that a "1.6 centimeter lesion * * * viewed on the lung slides would be considered progressive massive fibrosis." *Ibid.* The ALJ concluded that the Fourth Circuit's "equivalency standard" had been satisfied, even though neither Dr. Naeye nor Dr. Kleinerman "specifically found that the lesion would be greater than one centimeter in diameter when viewed by x-ray." *Id.* at 38.

Elkay Mining appealed to the BRB, and the BRB vacated and remanded. Pet. App. 21-31. The BRB determined that Dr. Naeye's opinion did not support an equivalency determination, because Dr. Naeye had not specifically testified as to whether the lesion he viewed through autopsy slides would have shown as an opacity greater than one centimeter in diameter if viewed through an x-ray. *Id.* at 28. In addition, the BRB concluded that the ALJ had misread Dr. Kleinerman's testimony, and that he had not in fact testified regarding a 1.6-centimeter lesion viewed through autopsy slides. *Id.* at 29.

c. On second remand, the ALJ concluded that the medical evidence did not give rise to Section 411(c)(3)'s irrebuttable presumption "under the stringent standard enunciated by [the Fourth Circuit]." Pet. App. 19.

The ALJ observed that there was no specific testimony from any doctor showing that the lesions appearing in autopsy evidence would have appeared as opacities of greater than one centimeter in diameter if viewed by x-ray. *Id.* at 18-19. The BRB affirmed. *Id.* at 4-15.

3. In an unpublished per curiam opinion, the court of appeals affirmed "on the reasoning of the [BRB]." Pet. App. 1, 2. In so ruling, the court stated that the BRB's decision was "based upon substantial evidence and [was] without reversible error." *Id.* at 2.

ARGUMENT

The Fourth Circuit interprets "massive lesions" as used in Section 411(c)(3)(B) of the Black Lung Benefits Act, 30 U.S.C. 921(c)(3)(B), to mean only those lesions which, if observed through x-rays, would appear as opacities measuring greater than one centimeter in diameter. Although the correctness of that interpretation is an open question, further review is not warranted at this time. No other court of appeals has had occasion to address the question presented, and the Director, Office of Workers Compensation Programs (OWCP), who administers the statute for the Secretary of Labor, see 30 U.S.C. 902(c), 957; 20 C.F.R. 725.482(b), has not taken a definitive position on the issue.[1]

1. Neither the Act nor the Secretary's implementing regulations provide a definition of the term "massive lesions" as used in Section 411(c)(3)(B). The Secretary has not identified a consensus view within the medical community regarding the criteria to apply in diagnosing pneumoconiosis by autopsy or biopsy. 65 Fed. Reg. 79,936 (2000); 64 Fed. Reg. 54,978 (1999). The Fourth

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[1] Although a party, 30 U.S.C. 932(k); 20 C.F.R. 725.482(b), the Director did not participate in this case in the court of appeals.

Circuit in *Blankenship*, *supra*, held that "massive lesions" must be given content by reference to the objective standard contained in Section 411(c)(3), *i.e.*, the standard governing x-ray evidence contained in clause (A). "Any other rule," the Fourth Circuit believed, "would lead to the irrational result that the determination of whether a miner has totally disabling pneumoconiosis could turn on the method of diagnosis rather than on the severity of his disease." 177 F.3d at 243.

To the extent the Fourth Circuit's interpretation permits equivalency determinations, that interpretation is at least partially correct. Congress obviously intended for the three evidentiary methods in Section 411(c)(3) to produce diagnoses of the same underlying condition, and an equivalency determination serves that congressional intent. Therefore, an administrative law judge should be permitted to conclude that the irrebuttable presumption is met based upon a physician's assertion that lesions viewed by autopsy or biopsy would produce opacities of greater than one centimeter in diameter if viewed through an x-ray. Cf. *Clites* v. *Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981) (sustaining ALJ's finding of complicated pneumoconiosis under clause (C) based upon pathologist's testimony that lesions observed at autopsy would have shown as opacities greater than one centimeter in diameter if viewed through x-ray).

It is less than clear, however, that Section 411(c)(3)(B) *requires* an equivalency determination whenever a claimant introduces autopsy or biopsy evidence. The text's use of the word "or" indicates that a claimant may prove the presence of the disease by satisfying the criteria of clause (B) without necessarily meeting the criteria of clause (A). The Fourth Circuit's

interpretation also is open to the charge that it renders clause (B) of the statute superfluous. If Congress intended, as the Fourth Circuit believed, to require equivalency determinations for autopsy and biopsy evidence, it can be argued that there was no need for Congress to enact clause (B), because clause (C) already requires an equivalency determination whenever "other" evidence is presented, 30 U.S.C. 921(c)(3). By placing autopsy and biopsy evidence in a separate clause from the one governing "other" evidence, Congress arguably signaled its intent for claimants to have greater flexibility in proving the existence of "massive lesions" through autopsy or biopsy evidence.

As the Fourth Circuit recognized in *Eastern Associated Coal Corp.*, 220 F.3d at 259, "Congress chose to use the word 'massive' [in Section 411(c)(3)] in its ordinary sense without giving it a precise statutory or medical definition." Therefore, ALJs should be permitted to determine, based upon all available autopsy or biopsy evidence, whether a claimant has met her burden of showing that a particular lesion is "massive" in comparison to lesions that are too small to support a diagnosis of complicated pneumoconiosis. An equivalency determination is one way to make that showing, but it may not be the only way. Cf. 30 U.S.C. 923(b) ("In determining the validity of claims under this part, all relevant evidence shall be considered.").[2]

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[2] Petitioner argues (Pet. 7) that the pathologist's autopsy report in this case should have been accepted as binding because Section 413(b) of the Act provides that the Secretary must accept an autopsy report presented by the claimant "concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis," unless the Secretary has reason to believe that the report is fraudulent or inaccurate. 30 U.S.C. 923(b). That is not correct. That provision does not trump the Secretary's obliga-

2. Although the Secretary has not endorsed the Fourth Circuit's interpretation of Section 411(c)(3)(B), this Court's review is not warranted at the present time. The Fourth Circuit's interpretation does not conflict with any decision from this Court or any other court of appeals. Petitioner is wrong in asserting (Pet. 4-5) that the Sixth Circuit in *Gray* v. *SLC Coal Co.*, 176 F.3d 382 (1999), has interpreted "massive lesions" as used in Section 411(c)(3)(B) in a manner that conflicts with the Fourth Circuit's interpretation. To the contrary, neither the Sixth Circuit nor any other court of appeals has even considered, much less rejected, the Fourth Circuit's approach.[3]

In *Gray*, the Sixth Circuit stated that, when a lesion or nodule is examined through an autopsy, it may "only justify invocation of the presumption [under Section 411(c)(3)(B)] if a physician provided an opinion that such a nodule would produce an opacity of greater than one centimeter if viewed by x-ray, or an opinion that such a nodule constitutes a 'massive lesion.'" 176 F.3d at 390 (quoting *Riddle* v. *Director, OWCP*, No. 95-1292, 1995 WL 715303, at *2 (4th Cir. Dec. 6, 1995) (70 F.3d 1263) (per curiam). *Gray* was altogether silent,

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tion under another provision of Section 413(b) to consider "all" relevant evidence, including contrary evidence presented by an employer-operator. 30 U.S.C. 923(b); cf. *Gray* v. *Director, OWCP*, 943 F.2d 513, 520 (4th Cir. 1991) (although Section 413(b) requires the Secretary to "accept" a qualified x-ray interpretation submitted by a claimant without subjecting it to a government-funded rereading, an ALJ must nonetheless consider contrary evidence submitted by a mine operator).

[3] Respondent Elkay Mining errs in suggesting that the Third Circuit in *Clites*, *supra*, has held that an equivalency determination is required by clause (B). Rather, that decision stated that such a determination is required by clause (C). 663 F.2d at 16.

however, on the meaning of the phrase "massive lesion," and did not indicate whether the court of appeals disagreed with the rule stated in *Blankenship* that a "massive lesion" must be shown by the criteria of clause (A). Nor did the Sixth Circuit in *Gray* have any occasion to pass on the validity of the Fourth Circuit's decision in *Blankenship* (which had been issued just three days before *Gray*). The physician in *Gray* testified not only that the nodules at issue would not have appeared as opacities greater than one centimeter in diameter if viewed by x-ray, but also that they "were not * * * 'massive lesions.'" *Gray*, 176 F.3d at 390 (citing 20 C.F.R. 718.304).

In the absence of a circuit conflict, the question presented is not appropriate for this Court's review at this time. The BLBA "has produced a complex and highly technical regulatory program," *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991), and the issue here is among the more complex aspects of the program. That complexity counsels in favor of allowing the courts of appeals the opportunity to explain their agreement or disagreement with *Blankenship*'s interpretation of Section 411(c)(3). Should a disagreement arise, this Court can then decide whether to provide a nationally binding resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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